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## ALTERNATIVE DISPUTE RESOLUTION

### 1. Purpose

The purpose of this Handbook is to provide guidance to attorneys in the Office of General Counsel in the implementation of GC Directive 8001, Alternative Dispute Resolution Program for Office of General Counsel.

### 2. What is Alternative Dispute Resolution?

Alternative Dispute Resolution (ADR) refers to a variety of methods that may be employed in resolving a dispute in lieu of utilizing a formal process or litigation. These include, but are not limited to, mediation, third-party neutral evaluation, arbitration, mini-trial or any combination thereof. It is a flexible process that may be designed to meet the needs of the parties to a dispute. The goal of employing ADR is to resolve a dispute at the earliest stage feasible, by the fastest and least expensive method possible, and at the lowest possible organizational level prior to litigation.

### 3. Definitions

#### a. Arbitration

Arbitration is a more formal adjudication in that the parties present their case in an adversarial fashion before one or more neutral parties who will issue a decision on the disputed issues. The decision of the arbitrator may be binding on the parties either by agreement or through operation of law or it may be non-binding or advisory.

#### b. Early Neutral Evaluation

Early neutral evaluation is a candid assessment of the strengths and weaknesses of a case by a neutral third party who has expertise in the subject matter of the dispute. The process usually involves an informal presentation to the neutral of the highlights of the parties' positions. The neutral provides the parties with a nonbinding evaluation of the case which gives the parties an objective assessment of their positions.

#### c. Minitrial

A minitrial is a structured process in which each side presents a highly abbreviated summary of its case before senior representatives of each party. The scope and format of the minitrial is determined by the parties and is outlined in a written agreement entered into by the parties. Following the presentations, the senior representatives attempt to settle the case. A neutral adviser may preside over the proceeding and can mediate or render an advisory opinion if asked to do so. A minitrial offers executives a quick, relatively inexpensive look at the realities of their dispute, without the filter of their lawyers' adversarial assessment.

#### d. Mediation/Arbitration and Other Hybrids

One of the more notable trends in ADR is the development and use of hybrid ADR processes. The advantage of ADR is that it allows the parties to pick and choose various components of

many different types of ADR and meld them together to create a hybrid ADR process that will best meet their needs. One of the oldest hybrids is mediation/arbitration (or med/arb) which calls for the parties to first engage in mediation and, if they are unable to reach agreement, to then submit to arbitration.

**e. Mediation**

Mediation is a voluntary, informal, and confidential process in which a neutral third party assists the disputing parties in reaching a settlement. The mediator has no power to impose a solution on the parties but rather provides facilitation in reaching an agreement acceptable to the parties.

**f. Neutral Fact-Finding**

In cases where the facts are complex, or not fully known to both parties, neutral fact finding may play an important role in speeding early resolution of the dispute. This form of ADR is particularly useful in complex cases involving fraud, contracts, construction and any other case in which a large body of complex facts must be investigated before any consequences are attached to those facts. Within the context of an ADR procedure, the parties decide whether or not the neutral's findings of fact will be binding.

**g. Settlement Judge**

This form of ADR uses a judge to perform various ADR and settlement functions. The settlement judge can be used to mediate the dispute, and/or provide the parties with frank assessments and objective, binding or non-binding evaluations of their cases (which can be helpful in creating movement in negotiating positions and settlement). The settlement judge may facilitate communication between the parties, help identify issues in conflict, promote an effective negotiating process and/or generate options for settlement. Typically, the settlement judge may not participate in any subsequent litigation if the matter is not settled. The settlement judge process can have components of early neutral evaluation, neutral fact-finding, mediation and arbitration as well as other hybrid processes and is distinguished by the use of a judge serving as the neutral.

**h. Summary Trial**

In a summary trial, counsel present their cases in summary form to a judge who renders a decision which, depending upon the intention of the parties, may be a binding or non-binding and advisory verdict. Frequently, the judge explains his/her reasoning to the parties and responds to their questions.

**4. Cases in which ADR may be appropriate**

**a. ADR *may* be a preferred option when:**

- (1) The Department would benefit from a quick resolution of the issues.
- (2) The legal issues are of minimal significance and setting precedent is not the objective.
- (3) Emotions may be diffused if a mediator becomes involved.

- (4) The chances of winning at trial are less than would be preferred.
- (5) The costs of preparing for trial are substantial relative to anticipated recovery.
- (6) There is a factual dispute based on the credibility of witnesses.
- (7) The case is going to become a battle of the experts.
- (8) Opposing counsel is contentious, incompetent or difficult.
- (9) Opposing counsel is an obstacle to resolution.
- (10) The time commitment for litigation is difficult to manage.
- (11) The potential for negative publicity outweighs the potential benefits of winning.
- (12) An appeal by the losing party is likely.
- (13) Liability for attorneys fees would be imposed on the losing party.

## **5. Cases in which ADR may not be appropriate**

a. ADR *may not* be a preferred option when:

- (1) There is a public policy issue which must be settled.
- (2) The law is not well established and a legal precedent is desired.
- (3) The parties involved in the dispute may not be similarly situated, *e.g.*, one party to the dispute may be easily intimidated by the other party to the dispute.
- (4) There is no incentive for one party to the dispute to seek to expeditiously resolve the dispute.
- (5) There is an ongoing parallel criminal investigation or proceeding involving the parties or the circumstances of the case.

## **6. Mediation**

a. Mediation is the preferred option for resolving disputes where the parties want to maintain their relationship, whether personal or professional, or where there are issues underlying the dispute which must be identified and resolved.

### **b. Description of the Process**

Mediation starts with a joint session at which both disputants are present. The mediator explains how the process works, asks the parties to sign a mediation agreement (establishing ground rules), answers questions, and gives each party an opportunity to tell her or his side of the dispute. That

exchange typically concludes the joint session and the mediator then meets with each of the disputants separately in a “caucus.” Thereafter, the parties and the mediator engage in a series of caucuses and joint meetings (varying with the type of case), leading to agreement or impasse.

## **7. Responsibility of Regional Councils in ADR**

The Regional Counsel has an integral role in ensuring the development of an effective ADR program for his/her client facilities. To assist in this role, the Regional Counsel shall designate at least one attorney in his/her region to serve as the ADR attorney for the region.

## **8. Responsibility of the ADR Attorney**

The ADR attorney shall be knowledgeable about the various forms of ADR, particularly mediation, and shall serve as a resource for information about ADR within his/her region.

### **a. Training**

When requested by a facility serviced by the Regional Counsel, the ADR attorney shall assist the facility in providing training in ADR/mediation to employees and in establishing an effective mediation program for the facility. If the ADR attorney participates in the training as a faculty member, he/she should develop a course evaluation form to be completed by course attendees. The evaluation forms will serve as a basis for assessing the quality and effectiveness of the training delivered. Following the completion of the training program, a summary of the course evaluations shall be prepared and forwarded to the Deputy Assistant General Counsel, Professional Staff Group VI (026B).

### **b. Program Development**

The ADR attorney shall be informed with respect to mediation resources which may be available locally for use by a facility in the implementation of its ADR/mediation program (*e.g.*, acquiring the services of a neutral to serve as a mediator). Additionally, the ADR attorney should assist a facility in the design and implementation of a viable mediation program. Whenever possible, the ADR attorney should assist a facility in assessing and evaluating the effectiveness of its ADR program. Such factors as the number of disputes successfully resolved by mediation, the degree of satisfaction of the parties with the mediation process, and the time frame within which a dispute was resolved through mediation are measures of the effectiveness of a mediation program.

### **c. Mediation**

(1) The ADR attorney may not serve as a mediator in disputes arising at facilities serviced by the supervisory Regional Counsel. This is necessary in order to avoid the appearance of a conflict of interest.

(2) The ADR attorney may serve as a mediator in disputes which arise at VA facilities other than those serviced by the supervisory Regional Counsel but only with the prior approval of the supervisory Regional Counsel and the Regional Counsel who services the facility requesting the mediation.

(3) In no event may the ADR attorney serve as a mediator in a contract dispute involving VA as a contracting party.

(4) The ADR attorney may serve as a mediator for another Federal agency under a shared-neutrals program (or its equivalent) with the approval of the supervisory Regional Counsel. The requesting Federal agency must agree, in advance, to pay all costs associated with the attorney's travel and other expenses.

(5) In each instance following a mediation in which a Regional Counsel attorney served as a mediator, an evaluation form shall be presented to the parties to the mediation and their representatives, if any. Copies of the completed evaluation forms shall be forwarded to the Deputy Assistant General Counsel, Professional Staff Group VI (026B). (A copy of the evaluation form is found at Appendix-A.)

**DEPARTMENT OF VETERANS AFFAIRS  
OFFICE OF GENERAL COUNSEL  
MEDIATION EVALUATION**

**USER SURVEY**

This form is to be completed by the parties to the mediation and their representatives (if any), and returned to Deputy Assistant General Counsel (026B), Department of Veterans Affairs, 810 Vermont Avenue, N.W., Washington DC 20420.

Aggrieved person's (complainant's) name: \_\_\_\_\_

Name of Mediator(s) \_\_\_\_\_

Was this a co-mediation (two mediators)? \_\_\_\_\_ or a single mediation (one mediator) \_\_\_\_\_

Mediator's level of participation: None \_\_\_\_\_; Low \_\_\_\_\_; Medium \_\_\_\_\_; High \_\_\_\_\_

Date of mediation: \_\_\_\_\_ Settled? \_\_\_\_\_; Not Settled? \_\_\_\_\_; Continued? \_\_\_\_\_

Are you: the aggrieved person? \_\_\_\_\_; the management representative? \_\_\_\_\_; the aggrieved person's representative? \_\_\_\_\_; a management participant? \_\_\_\_\_; or other participant? \_\_\_\_\_

*Your comments are important. Please rate each item as follows: 1 = poor; 2 = fair; 3 = good; 4 = excellent; 5 = outstanding.*

1. During the introductory statement, how well did the mediator explain the process?	1	2	3	4	5
2. Were you able to fully present your case?	1	2	3	4	5
3. How well did the mediator listen?	1	2	3	4	5
4. Did the mediator help generate realistic options for settling the dispute?	1	2	3	4	5
5. Did the mediator treat all parties equally?	1	2	3	4	5
6. Did the mediator understand the legal and factual issues involved?	1	2	3	4	5
7. How well did the mediator clarify key issues and interests of each party?	1	2	3	4	5
8. How satisfied were you with the mediation process?	1	2	3	4	5
9. How satisfied were you with the outcome of the mediation?	1	2	3	4	5
10. How satisfied were you with the mediator(s)?	1	2	3	4	5
11. If the mediator was from another Federal Agency, how helpful was that?	1	2	3	4	5
12. Was mediation appropriate for this case?	1	2	3	4	5
13. If this was a co-mediation, how beneficial was it to have two mediators?	1	2	3	4	5
14. Do you have any other comments? Use an additional piece of paper if necessary.					